IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

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NO. 78-430

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EDGAR TODD, JR., et al.,
Petitioners,
v.
ASSOCIATED CREDIT BUREAU SERVICES, INC., et al.,
Respondents

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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# BRIEF OF RESPONDENT ASSOCIATED CREDIT BUREAU SERVICES, INC. IN OPPOSITION

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## STATUTES INVOLVED

Fair Credit Reporting Act, §607(b), 15 U.S.C. §1681e(b):

> Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of information concerning the individual about whom the report relates.

Fair Credit Reporting Act, §611, 15 U.S.C. §1681i:

> (a) If the completeness or accuracy of any item of information contained in his file is disputed by a consumer, and such dispute is directly conveyed to the consumer reporting agency by the consumer, the consumer reporting agency shall within a reasonable period of time reinvestigate and record the current status of that information unless it has reasonable grounds to believe that the dispute by the consumer is frivolous or irrelevant.
>
> If after such reinvestigation such information is found to be inaccurate or can no longer be verified, the consumer reporting agency shall promptly delete such information....
>
> (b) If the reinvestigation does not resolve the dispute, the consumer may file a brief statement setting forth the nature of the dispute. The consumer reporting agency may limit such statements to not more than one hundred words if it provides the consumer with assistance in writing a clear summary of the dispute.

(c) Whenever a statement of a dispute is filed, unless there is reasonable grounds to believe that it is frivolous or irrelevant, the consumer reporting agency shall, in any subsequent consumer report containing the information in question, clearly note that it is disputed by the consumer and provide either the consumer's statement or a clear and accurate codification or summary thereof.

(d) Following any deletion of information which is found to be inaccurate or whose accuracy can no longer be verified or any notation as to disputed information, the consumer reporting agency shall, at the request of the consumer, furnish notification that the item has been deleted or the statement, codification or summary pursuant to subsection (b) or (c) of this section, to any persons specifically designated by the consumer who has within two years prior thereto received a consumer report for employment purposes, or within six months prior thereto received a consumer report for any other purpose, which contained the deleted or disputed information. The consumer reporting agency shall clearly and conspicuously disclose to the consumer his rights to make such a request. Such disclosure shall be made at or prior to the time the information is deleted or the consumer's statement regarding the disputed information is received.[1]

1. Respondent respectfully notes that the excerpt from §611(a) of the Act as set forth in the Petition for Certiorari is incorrect in that the word "correct" was inadvertently substituted for the word "current."



## COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether a consumer reporting agency reports "accurate" information under the Fair Credit Reporting Act when it correctly reports the status of an account as of a stated date in the past, but neither gives nor purports to give the current status of the account.

2. Whether Congress intended to create civil liability for "incompleteness" or lack of currency in cases such as this, thereby requiring Credit Bureaus to update information constantly.

3. Whether Respondent Associated Credit Bureau Services, Inc. had any obligation of disclosure under §611 of the Fair Credit Reporting Act which it failed to fulfill.

## COUNTERSTATEMENT OF THE CASE

The depositions and pleadings in this case establish the following facts not fairly in dispute: Associated Credit Bureau Services, Inc. ("Credit Bureau") is a "consumer reporting agency" and issued "consumer reports" regarding Plaintiff Edgar Todd, Jr. to Kern's Furniture Store on November 14, 1975; to Merchant's National Bank on October 20, 1975; and to Sears Roebuck & Co. on December 17, 1974. Along with other information, each of these reports related that as of March, 1973, Plaintiff Edgar Todd, Jr. owed Hess's the sum of $1227; that as of that date the entire

balance was past due, and had been charged by Hess's, Inc. to profit and loss as a bad debt, and/or that the account had been placed for collection. All of this was true. (N.T. Edgar Todd 18-19; N.T. Rohrbach 18-19 and Exhibit 1, p. 4; and N.T. Alice Todd 93-95).

The Petitioners rest their entire case on the undisputed fact that in September, 1974, the account at Hess's was paid in full, and that this fact--not reported to Credit Bureau and not known by Credit Bureau--was not contained in the consumer reports listed above. Upon later ascertaining that the account had subsequently been paid, Credit Bureau added that fact to the information in its files.

## REASONS WHY THE WRIT SHOULD BE DENIED

Credit Bureau admits being a consumer reporting agency which issues consumer reports. Accordingly, the first portion of Petitioner's Brief is inapplicable and will not be discussed. The Petition also contains oblique references to Petitioner's Motion for Partial Summary Judgment, which the trial court denied. Of course, the refusal to grant summary judgment is an interlocutory order which is not appealable under the relevant jurisdictional statutes. 28 U.S.C. §§1291, 1292.



### I. The Consumer Reports Issued by Credit Bureau were "Accurate" within the Meaning of the Fair Credit Reporting Act.

The second issue framed by Petitioners is whether liability arises from a report of "stale and misleading information." In part of the argument on that issue, Petitioners also suggest that the information reported was "inaccurate." It is important to note at the outset that the obligations imposed by the Act on consumer reporting agencies are not couched in those terms. Petitioners rely primarily on Section 607(b), 15 U.S.C. §1681e(b).[2] That provision sets forth the Act's requirements regarding accuracy of consumer reports:

> "Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of information concerning the individual about whom the report relates." §607(b), 15 U.S.C. §1681e(b).

Thus, strict accuracy is not a requirement of the Act; instead, agencies need only adopt "reasonable procedures" directed to that goal.

Petitioners, however, demonstrably failed to meet even the threshold question of

2. Two other sections are advanced as supporting liability. The first, §601(n), 28 U.S.C. §1681(b), is a statement of Congressional purpose, and imposes no independent requirements. The second, §611(d), 15 U.S.C. §1681(d), is discussed infra, at 17.

inaccuracy. Courts which have construed this section have consistently held that where the information contained in a consumer report is accurate, the issue of reasonableness of procedures need not be reached. Middlebrooks v. Retail Credit Company, 416 F. Supp. 1013 (N.D. Ga. 1976); Austin v. Bankamerica Service Corporation, 419 F. Supp. 730 (N.D. Ga. 1974); Peller v. Retail Credit Company, 359 F. Supp. 1235 (N.D. Ga. 1973), aff'd mem. 505 F.2d 733 (5th Cir. 1974); Roseman v. Retail Credit Co. Inc., 428 F. Supp. 643 (E.D. Pa. 1977). Plaintiff's unsupported implication that a conflict exists among the Circuits on this point is not correct.[3] This holding represents the unanimous view of those courts which have considered this issue.

The information provided in the reports issued by Credit Bureau in this case was not "inaccurate" in any normal sense of the word. Credit Bureau simply informed its clients that as of a certain date, Mr. Todd had defaulted on one of his credit arrangements, and that as of that date, his creditor had written off the obligation as a bad debt or placed the account for collection.

3. In fact, the Plaintiff cites only one Circuit Court decision with any discussion whatsoever. Millstone v. O'Hanlon Reports, Inc., 528 F.2d 829 (8th Cir. 1976), involved information which was clearly inaccurate.



The fact that Mr. Todd later paid the account does not render untrue the fact that he had previously defaulted, and that historical fact was and is relevant credit information. The District Court and the Court of Appeals, recognizing this reality, found the report to be accurate. This made summary judgment appropriate without reaching the issue as to the reasonableness of Credit Bureau's procedures.

In their brief before the Court of Appeals, Petitioners for the first time attempted to find record support for the argument that the credit report did not simply speak as of a date in the past. Yet nothing in the record supports this notion that Credit Bureau purported to deliver a current financial statement of the Todds. In the Petition before this Court, Petitioners state that "according to Randall Skeath, Credit Manager of Kern's Furniture, [Credit Bureau's report] meant that the bill remained unpaid on November 14, 1975 even though the reality was that the bill was paid in full September of 1974." It is not surprising that Petitioners do not refer to any portion of the record to support this statement, because it is incorrect. Mr. Skeath's testimony was clearly to the contrary -- he testified that the report spoke as of a time in the past. (N.T. Skeath, p. 145). The report was silent regarding the current status of that account, and Skeath understood it to be so. That

Kern's gave credit to the Todds when it received assurance that the balance had been paid is not to the contrary. The report of non-payment as of the earlier date did not negate payment as of the time of the transaction and Skeath simply required assurance that the old debt was now paid.

Ronald Smith, Credit Bureau's manager, also gave unequivocal testimony as to what Credit Bureau's reports stated. He explained clearly that the report merely recorded a fact in existence on a date in the past. (N.T. Smith, 32-3). In short, Credit Bureau's recorded information spoke only as of March of 1973. Petitioners concede that the reported facts were true as of that date. Accordingly, the District Court and the Court of Appeals correctly found that the information reported by Credit Bureau was accurate.

The Petition for Certiorari also contains a bald reference to "the reality of actual trade practice, and the meaning of the words as used in the trade." Again, there is absolutely nothing in the record to be considered on a Motion for Summary Judgment which supports this flat statement. A mere self-serving contention in a petition for certiorari regarding "trade practice" is insufficient to overcome the District Court's finding based on Skeath's testimony and uncontroverted evidence of what the Credit Bureau's data bank contained.



The Middlebrooks case, supra, involved a credit report containing information that the plaintiff had been arrested in connection with a gambling raid. The plaintiff did not contest the accuracy of the fact of arrest; he "only dispute[d] the place of arrest and argue[d] that some mention should have been given that there was no ultimate disposition of the criminal charge against Mr. Middlebrooks." 416 F. Supp., at 1015. The Court rejected the plaintiffs' attack under §607(b).

> "[T]his Court need not reach the issue of 'reasonableness' if it finds initially that the report furnished was inaccurate.
> ...
> Since the plaintiffs do not dispute the accuracy vel non of the statement that Mr. Middlebrooks was arrested, we, therefore, conclude that plaintiffs are not entitled to recover for willful or negligent violation of 15 U.S.C. §1681e(b)." 416 F. Supp., at 1015-1016.

The same result should be reached here, where it is beyond dispute that in fact Petitioners defaulted on the Hess's account, and that Hess's had charged the debt to profit and loss and placed it for collection. This information was valid and relevant data regarding Mr. Todd's creditworthiness, regardless of whether or not he ultimately paid the debt one and one-half years later.

The plaintiffs also characterize these reports as "stale," implying that the information

was too old to report. As the record shows, the report on Mr. Todd's default as of March, 1973 was given in December of 1974 and in October and November of 1975. Plaintiff's argument is unavailing, since the statute includes an explicit legislative judgment as to when adverse information of this type would be too old to report. Section 605 of the Act, entitled "Reporting of obsolete information prohibited," provides:

> Except as authorized under subsection (b) of this section [involving, inter alia, credit transactions of $50,000 or more], no consumer reporting agency may make any consumer report containing any of the following items of information:
> ...
> (4) Accounts placed for collection or charged to profit and loss which antedate the report by more than seven years. 15 U.S.C. §1681c(a)(4).

The prohibition of use after seven years implies a permissible use for seven years.[5]

The legislative history makes this intention clear; the section reflects a balancing

5. The petition cites a portion of the FTC's Compliance Pamphlet discussing "periodic re-evaluation" of data. (p. 48). Apart from the fact that this is not inconsistent with Credit Bureau's practice, it is necessary only to refer to an earlier footnote in the Petition regarding the same document: "It is respectfully pointed out that the FTC does not have rule making power under the F.C.R.A. and that its opinions are not binding on the Court." Much less could the FTC's pamphlet author vary the plain language of the statute quoted above.



of the need of creditors to know about such matters and the need of consumers not to be unduly stigmatized. As Senator Proxmire, the author and floor manager of the bill, reported to the Senate:

> Creditors obviously have a right to know if a person has had trouble in paying his bills. At the same time it is unfair to burden a consumer for life with a bad credit record if he has improved his performance. The Associated Credit Bureaus has recognized this problem and has proposed voluntary guidelines to its members to the effect that adverse information not be reported if it is older than 7 years or 14 years in the case of bankruptcies.
> ...
> The bill would handle this problem by prohibiting the reporting of adverse information older than 7 years or 14 years in the case of bankruptcies, thus extending the ACB voluntary guidelines to other segments of the industry."
> 15 Cong. Rec. 33410 (1969). See also S. Rep. No. 91-517, 91st Cong., 1st. Sess., 4 (1969).

The legislation was intended to approve and mandate the prior industry practice of purging this class of information only after seven years. Thus plaintiffs' contention that the report could somehow give rise to liability because the information was "stale" is wholly devoid of merit.

Finally, the plaintiffs have characterized the reports involved here as "incomplete." Apparently, plaintiffs intend to

include "completeness" within the meaning of the word "accuracy" in 607(b). But the Credit Bureau has no obligation under the Act or any other law to "update" the information in its files every three months or 13 months or 14 months, as the plaintiffs apparently contend.

Again, basic statutory construction makes it clear that such an onerous requirement was not the intention of Congress. It is important to note the language of another section of the same statute, providing procedures for resolving consumer objections to information in credit files. Section 611 of the Act provides that "If the completeness or accuracy of any item of information contained in his file is disputed by the consumer, [certain procedures shall be followed.]" 15 U.S.C. §1681i. (emphasis supplied). These two sections are, of course, in pari materia; and since Congress is presumed to have used no superfluous words, Born v. Allen, 291 F.2d 345 (D.C. Cir. 1960), the statutory word "accuracy" in §607 cannot mean "completeness and accuracy" as used in §611. Accordingly, plaintiffs can have no cause of action under §607 based on "incompleteness."

Another section of the Act reinforces this conclusion. Section 613, entitled "Public record information for employment purposes," provides:



> "A consumer reporting agency which furnishes a consumer report for employment purposes and which for that purpose compiles and reports items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer's ability to obtain employment shall--
> ...
> (2) maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date." 15 U.S.C. §1681k (emphasis added).

That Congress expressly specified this one instance requiring strict procedures to ensure updating of consumer report data rebuts plaintiffs' broader contention that updating is required in all cases. Expressio unius est exclusio alterius is a well-settled principle of statutory construction. National Railroad Passenger Corporation v. National Association of Railroad Passengers, 414 U.S. 453, 458 (1974). "When the legislature has carefully employed a term in one section and has excluded it in another, it should not be implied where excluded." Bott v. American Hydrocarbon Corporation, 458 F.2d 229, 233, (5th Cir. 1972).

## II. Congress did not Intend to Create Civil Liability for "Incompleteness" - or Lack of Current Information - in Cases Such as This.

In enacting the Fair Credit Reporting Act, Congress produced a comprehensive, unified scheme for regulating the flow of consumer credit information. It recognized that inaccurate or incomplete information would find its way into credit files. Balancing both the magnitude of the task of maintaining such files and the importance to the consumer of credit reports, Congress chose specific and exclusive methods for approaching the goals of accuracy and completeness.

Beyond the specific obligations imposed on agencies by the Act,[6] Congress provided (in Sections 609 through 612 of the Act) for a consumer-initiated procedure to correct inaccuracies and make credit files complete. Section 611 requires that "If the completeness or accuracy of an item of information contained in his file is disputed by a consumer, ... the consumer reporting agency shall... record the current status of that information...." 15 U.S.C. §1681i (emphasis supplied). Further subsections deal with resolving

6. Except for public record employment information, these are that agencies maintain the "reasonable procedures" discussed below, that they not report obsolete information as defined in the Act, and that they report only to the proper people.



such disputes and notifying former users of any inaccurate information when the consumer so requests. This is the procedure Congress chose for resolving problems such as the Todds', and this procedure was followed in their case. (N.T. Edgar Todd 33-40; N.T. Alice Todd 91-100.)

Plaintiffs apparently would construe the statutory scheme to require a credit agency to update constantly every bit of information in its files. But this and other methods were considered and rejected by Congress in favor of the method described above. As shown in the way it treated adverse public record information used for employment purposes, Congress weighed two approaches to ensure updating when required by public policy: (1) to require the agency to give notice of the adverse information to the subject thereof, or (2) to require the agency to make an investigation on the current status of the information, that is, to update. Updating would obviously cost more than notifying, and would be quite expensive[7]--and Congress decided, after

7. Credit Bureau submitted an affidavit with its motion showing that to update all its information annually would require a 624% increase in work-force involved. To update all adverse trade experience data in all files would require 208% increase in that work-force and related expenses.

thinking about it, that even requiring notification in every case was too onerous a burden to place on the consumer reporting agency:[8]

> "Mr. PROXMIRE. As I drafted this bill originally, I provided that whenever adverse information is included in any file, the consumer would have to be notified, and I was strongly for that. This was discussed by the committee. It was discussed in the hearings at some length. We were finally convinced that this would involve so much expense and so much difficulty for the credit agencies that they had a legitimate complaint about it. Therefore, we took something which would be less satisfactory to the consumer--I would agree--but which would work in most cases; that is, whenever, a consumer is turned down, he then could have the right to find out what is in his credit file and to have it corrected.
>
> The Senator from New York is absolutely correct in his implications about inaccurate, untrue, or slanderous information in a file which many people might not know exists. But the theory is that until they are damaged in some way by an adverse reaction on employment, insurance, or credit, they do not have as much basis for correcting it.
> ...

8. As the cost of credit is passed along to the consumers who use it, imposing such a burden on all credit bureaus would ultimately inure to the detriment of consumers, and would be inconsistent with the Congressional findings and statement of purpose in enacting the statute. See §602(a)(1) - (3), 15 U.S.C. §1681.



> Mr. JAVITS. [The right of a consumer to bring suit for false information furnished with malice] is very important because I realize the reporting agencies get something out of this. They get a limitation of liability; the right to publish certain information, as in periodicals, not notifying the consumer until he is hurt.
>
> Mr. PROXMIRE. That is the quid quo pro [sic] for full disclosure."
> 115 Cong. Rec. 33411 (1969).

Thus for the normal credit report--like the one in this case--updating is not required until the consumer initiates the review procedure established by Sections 609 through 612 of the Act, 15 U.S.C. §§1681g-1681j.

## III. Credit Bureau Had No Obligation Under Section 611 of the Act that it Failed to Fulfill.

In their final argument, Petitioners contend that the Fair Credit Reporting Act imposes on consumer reporting agencies the obligation to inform consumers of their right to request notification of all businesses who received disputed information, where that information is incomplete and inaccurate. Even if this stated the law correctly, it would assume that the information concerned in this case was inaccurate. As found by the Courts below, the information was not inaccurate.

The Petition contains the assertion that "the Court found that Associated failed to advise the plaintiffs of their right to have all businessmen who received the disputed information of an update of their file [sic]." This is also incorrect. In fact, Credit Bureau contested the contention that its interviewer had not notified the Todds of all their statutory rights. But while this is a "genuine issue of fact" between the parties, it is not "material" within the meaning of Rule 56, and both lower courts correctly decided that summary judgment was proper.

The dispute is of law, not fact. Plaintiffs contend that under Section 611, Credit Bureau is obliged not only to add further subsequently arising information to the truth reported as of an earlier date, but also to inform the consumer that the Credit Bureau will report to previous users about the new information. However, the Act does not so obligate Credit Bureau. Again, the fundamental issue which plaintiffs ignore is the statutory distinction between "accuracy" and "completeness." Section 611 establishes the procedure to be followed by a consumer contesting the accuracy or completeness of information in his file. Information that is inaccurate or can no longer be verified must be deleted:



> (a) If the completeness or accuracy of any item of information contained in his file is disputed by a consumer, and such dispute is directly conveyed to the consumer reporting agency by the consumer, the consumer reporting agency shall within a reasonable period of time reinvestigate and record the current status of that information unless it has reasonable grounds to believe that the dispute by the consumer is frivolous or irrelevant. If after such reinvestigation such information is found to be inaccurate or can no longer be verified, the consumer reporting agency shall promptly delete such information....
> 15 U.S.C. §1681i(a).

Section 611(b) provides the course to be followed when a dispute is not resolved, and subsection (c) requires that a statement of dispute filed pursuant to subsection (b) must be included in any subsequent consumer report. 15 U.S.C. §1681i(b) and (c).

It is only subsection (d) that requires the agency, upon the consumer's request, to notify those who prior thereto received reports - and that requirement becomes applicable only where a deletion of inaccurate information is required or made, or where the accuracy of information is disputed and a statement regarding the dispute placed on file. Middlebrooks, supra, 416 F. Supp. at 1014; Roseman, supra, 428 F. Supp. at 646. The subsection provides:

> (d) Following any deletion of information which is found to be inaccurate or whose

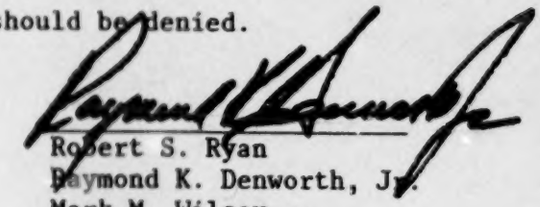
> accuracy can no longer be verified or any notation as to disputed information, the consumer reporting agency shall, at the request of the consumer, furnish notification that the item has been deleted or the statement, codification or summary pursuant to subsection (b) or (c) of this section to any person specifically designated by the consumer who has within two years prior thereto received a consumer report for employment purposes, or within six months prior thereto received a consumer report for any other purpose, which contained the deleted or disputed information. The consumer reporting agency shall clearly and conspicuously disclose to the consumer his rights to make such a request. Such disclosure shall be made at or prior to the time the information is deleted or the consumer's statement regarding the disputed information is received. 15 U.S.C. §1681i(d)

In our case, no deletion or notation was made or required, because the information complained of was not inaccurate within the meaning of the statute. The Courts below were correct, therefore, in concluding that Credit Bureau was under no obligation to notify the plaintiffs of any right on their part to request notification; they possessed no such right under §611(d).



## CONCLUSION

For all of these reasons, the Petition for a Writ of Certiorari should be denied.



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